PREME COURT, U. S.

DEC 9 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 826

DONALD J. MARIANI,

Petitioner,

against

JAMES T. FOLEY, United States District Judge for the Northern District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on October 10, 1968, denying petitioner's petition for a writ of mandamus.

Opinions Below

No opinions were written by the Courts below.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 10, 1968. An order extending the time herein in which to file a petition for writ of certiorari was signed by John M. Harlan, Asso-

ciate Justice of the Supreme Court of the United States, on October 30, 1968, extending the time to file said petition until December 9, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Questions Presented

1. Do the complaint and accompanying affidavits herein, as a matter of law, indicate probable cause that the defendant committed the crime charged?

2. Can a warrant of arrest legally issue upon a complaint and accompanying affidavits which fail to indicate probable cause that the defendant committed the crime charged?

3. Does a defendant have a right to have an illegal warrant of arrest quashed by the United States District Court prior to indictment?

4. Should a writ of mandamus issue from the United States Court of Appeals to compel a District Court Judge to quash an illegal warrant of arrest after the Judge has denied a motion to quash?

5. Was the denial of defendant's motion to quash by the Respondent herein such a departure from the usual course of judicial proceedings such that a writ of mandamus should have been granted by the Court of Appeals?

Constitutional Provisions, Statutes, Federal Rules Involved

The following provisions of the U. S. Constitution, Statutes, and the Federal Rules of Criminal Procedure are involved in the issues herein:

U. S. Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against un-

reasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rules of Criminal Procedure:

Rule 3. "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a). "If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it . . ."

United States Code:

Title 28, Section 1651 (a). "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

Statement of the Case

This is a criminal case concerning an alleged violation of the laws of the United States.

In early April of 1968, Donald J. Mariani, the petitioner herein, was arrested by Federal authorities and charged with a violation of United States Code, Title 18, Section 659.

On June 17, 1968, petitioner moved in the United States District Court for the Northern District of New York for an order quashing the warrant of arrest against the petitioner, and dismissing the complaint and affidavit upon which said warrant of arrest was based, on the ground that

said complaint and affidavit failed to show probable cause that petitioner committed the offense charged. The motion was denied by Hon. James T. Foley, District Court Judge, the respondent herein.

A petition, dated August 28, 1968, was made to the United States Court of Appeals for the Second Circuit, to compel the respondent District Court Judge to grant the aforesaid motion. Said petition was denied by the Court of Appeals by order dated October 10, 1968.

The instant petition seeks a review of the aforesaid denial of the petition for mandamus by the United States Court of Appeals for the Second Circuit.

Reasons for Granting the Writ

The petitioner is seeking to enforce his rights under the Fourth Amendment of the United States Constitution. It has been held that the Fourth Amendment applies to arrest warrants as well as search warrants.[1] The cases, led by *Giordenello*, make it clear that for a warrant of arrest to be valid, the complaint, or affidavits therewith, must show probable cause that the defendant committed the offense charged.[2] In *Jones v. United States*[3] it was held that "[a]n adequate basis for a finding of probable cause must appear on the face of the complaint."[4]

The only mention of petitioner in the affidavit annexed to the complaint is a rather indefinite identification of a "Dominick Marino" as one of a group who inquired about the

[1] *Giordenello v. United States* (1958), 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245. See also: *Pellullo v. United States* (1966, C.A. 2, N.Y.) 284 F. 2d 897, vacated on other grounds, 389 U.S. 121, 7 L. Ed 2d 614, 82 S Ct. 654; *United States v. Beach* (1968, D.C., Mich.), 269 F. Supp. 15; *United States v. Greenberg* (1963, C. A. 9, Calif.), 320 F. 2d 467.

[2] *Ibid.*

[3] 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, (1960).

[4] *Ibid.* See also: *Aguilar v. State of Texas* (1964), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; *Giordenello v. United States.*

rental of a U-Haul truck on the day after the crime charged was allegedly committed. It is submitted that this is by no means sufficient to indicate probable cause that petitioner was involved in the commission of the crime.

The Supreme Court, in *Jaben* v. *United States*,[5] stated that it is necessary that "enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." [6] It is submitted that in the instant case, the information presented to the Commissioner concerning petitioner was not sufficient to meet this test.

Upon the denial of petitioner's motion by the District Court Judge, petitioner attempted to enforce his Fourth Amendment rights by petitioning to the United States Court of Appeals for the Second Circuit for a writ of mandamus. The Court of Appeals has full power to grant such a writ by virtue of United States Code, Title 28, Section 1651. Petitioner was not entitled to appeal from the decision of the District Court as the order of said District Court was not a final order. It is submitted that by its denial of the aforesaid petition for a Writ of Mandamus the Court of Appeals so far sanctioned the departure by the District Court from the accepted and usual course of judicial proceedings, as to call for an exercise of the jurisdiction of the United States Supreme Court.

The major reason why this writ should be granted is to ensure enforcement of petitioner's rights under the Fourth Amendment. It is inconceivable that under our system of justice a right as basic as that here in issue should be incapable of enforcement. It should be noted that the petitioner was arrested in early April of 1968 and that at the time of this writing, the charges against him have not yet been pre-

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[5] 381 U.S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (1965).

[6] *Ibid.* See also: *United States* v. *Sullivan* (1966, C. A. 4, Md.) 360 F. 2d 699; *United States* v. *White* (1965, C. A. 4) 342 F. 2d 379.

sented to a grand jury. Petitioner here seeks only to have the arrest declared illegal in order to remove himself from the status of continuing "under arrest" for an indefinite period.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DATED: NOVEMBER 27, 1968.

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No. 826

DONALD J. MARIANI, PETITIONER

v.

JAMES T. FOLEY, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the order of the United States Court of Appeals for the Second Circuit entered on October 10, 1968 denying his application for a writ of mandamus to compel the district court to hear and decide his motion challenging the validity of his arrest. The relevant facts[1] show that on April

[1] These facts appear from the pleadings in the courts below presently on file with the Clerk of this Court.

8, 1968 a warrant for petitioner's arrest was issued by a United States Commissioner in the Northern District of New York, charging that he had participated in the theft of 824 cases of Scotch whiskey moving in interstate commerce, in violation of 18 U.S.C. 659. In support of the warrant an affidavit was filed by an F.B.I. agent setting forth information that on the early morning of March 2, 1968 several men had illegally removed liquor from a trailer truck at the Express Terminal in Rensselaer, New York into two U-haul vans and had thereafter transported the liquor to a garage in Albany, New York. The affidavit recited that petitioner[2] had been identified by an employee of the rental agency as one of the three individuals who rented the U-haul trucks a few hours before the theft (Ex. A). On April 9, 1968, petitioner appeared before the Commissioner and was released on $5,000 bail. Preliminary hearing was set for May 14, 1968. Thereafter, at the government's request, the hearing was rescheduled for June 18, 1968.

On June 17, 1968, a hearing was held before District Judge Foley on petitioner's motion to dismiss the complaint on the ground that there was no probable cause for the issuance of the arrest warrant (Ex. C). At the hearing, government counsel noted that nothing had been seized from petitioner at the time of the arrest; that a hearing was scheduled before the Com-

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[2] Altough the petitioner asserts that the only mention of petitioner in the affidavit is a reference to a Dominick Marino (Pet. 4), the affidavit makes clear that "Marino" was petitioner Donald Mariani.

missioner the following day to determine the probable cause issue and that there was no reason for the district judge to intervene at this preliminary stage. The court agreed and denied the motion (Ex. G). We have been advised by the United States Attorney that, at a hearing held June 19, 1968, the Commissioner determined that there was probable cause for the issuance of the warrant for petitioner's arrest; and that on December 20, 1968, an indictment was returned against petitioner charging theft of the liquor from an interstate shipment.

The petition does not raise any issue that would warrant the issuance of a writ of mandamus. The grand jury has returned an indictment finding sufficient cause to try petitioner for the offense for which he was originally arrested. He is thus subject to trial irrespective of the validity of his original arrest. See *Frisbie* v. *Collins*, 342 U.S. 519; *Ker* v. *Illinois*, 119 U.S. 436. Moreover, any claim petitioner may have as to the lawfulness of the arrest should be raised in the pending criminal case. Cf. *DiBella* v. *United States*, 369 U.S. 121. In these circumstances, mandamus is not available. *Will* v. *United States*, 389 U.S. 90.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

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